IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
William B. Murphy, Presiding Judge

RICKY REED
Plaintiff, Counter-Defendant-Appellee,

v

LINDA SUSAN YACKELL
Defendant and Cross-Defendant,

Docket no. 126534

and

BUDDY LEE HADLEY
GERALD MICHAEL HERSKOVITZ
MR. FOOD, INCORPORATED
Defendants, Counter-Plaintiffs, Cross-Plaintiffs-Appellants.
_____/

BRIEF ON APPEAL - AMICUS CURIAE COMPENSATION SECTION OF STATE BAR

Martin L. Critchell (P26310)
Counsel for amicus curiae
Workers' Compensation Section of the
State Bar of Michigan
660 Woodward Avenue, Suite 1010
Detroit, Michigan 48226
(313) 961-8690

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

CASES

STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

The Court has jurisdiction to review the opinion that was entered by the Court of Appeals in *Reed v Yackell (On Remand)*, unpublished opinion of the Court of Appeals, decided on June 8, 2004 (Docket no. 236588) by authority of the Michigan Court Rules of 1985, MCR 1.101, et seq. MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

I

WHETHER A CIRCUIT COURT MAY DECIDE WHETHER A PERSON IS AN *EMPLOYEE* WITHIN THE RUBRIC OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

Plaintiff, counter-defendant-appellee Ricky Reed answers "Yes."

Defendant and cross-defendant Linda S. Yackell does not answer.

Defendants, counter-plaintiffs, cross-plaintiffs-appellants Buddy L. Hadley, Gerald M. Herskovitz, and Mr. Food, Inc, answer "Yes."

Amicus curiae Workers' Compensation Section of the State Bar of Michigan answers "No."

Court of Appeals did not answer.

Trial Court did not answer.

STATEMENT OF FACTS

Defendant, counter-plaintiff, cross-plaintiff-appellant Buddy L. Hadley (Employee) was an employee of defendant, counter-plaintiff, cross-plaintiff-appellant Mr. Food, Incorporated (Company) who offered plaintiff, counter-defendant-appellee Ricky Reed (Assistant) a few dollars to help with a delivery. The Assistant agreed. (99a) The Assistant was injured when making the delivery when defendant and cross-defendant Linda S. Yackell (Car Driver) crashed into the van that the Employee was driving. (96a)

The Assistant filed a complaint with the Circuit Court for the Third Judicial Circuit of the State of Michigan (Circuit Court) to recover damages from the Employee, the Company, and the Car Driver. (96a) The Employee, the Company, and the Car Driver appeared and denied responsibility.

The Circuit Court denied a motion by the Employee and the Company for a directed verdict which claimed that the Assistant was an *employee* within the rubric of the Workers' Disability Compensation Act of 1969, MCL 418.101, et seq., whose only recourse was compensation. (40a) After the conclusion of the trial, the Circuit Court entered judgment for the Assistant of $502,528.00 from the Employee and the Company. *Reed v Yackell*, unpublished judgment of the Circuit Court for the Third Judicial Circuit of the State of Michigan, entered on January 12, 2001 (Docket no. 98-839576-NI). (49a)[1] The Circuit Court denied a motion by the Employee and the Company for a judgment notwithstanding the verdict which again claimed that the Assistant was an *employee* whose only recourse was compensation. (66a-67a) *Reed v Yackell*, unpublished order of the Circuit Court for the Third Judicial Circuit of the State of Michigan, decided on June 15, 2001 (Docket no. 98-839576-NI).

---

[1] The Circuit Court entered a separate judgment for the Assistant of $753,792.00 from the Car Driver. *Reed v Yackell*, unpublished judgment of the Circuit Court for the Third Judicial Circuit of the State of Michigan, entered on January 12, 2001 (Docket no. 98-839576-NI). (50a)

The Court of Appeals affirmed. *Reed v Yackell*, unpublished opinion of the Court of Appeals, decided on February 14, 2003 (Docket no. 236588). (72a-76a)

The Court reversed and remanded the case for the Circuit Court to establish "whether [the Assistant] was an employee in the service of [the Employee or the Company] under any contract of hire, express or implied" and "whether [the Assistant] maintained a separate business as a day-laborer and . . . held himself out to the public as a day-laborer." *Reed v Yackell*, 469 Mich 960; 671 NW2d 452 (2003). (81a)

The Circuit Court decided on remand that the Assistant was not an employee in the service of the Employee or the Company and maintained a separate business as a day-laborer who held himself out to the public as a day-laborer. *Reed v Yackell (On Remand)*, unpublished order of the Circuit Court for the Third Judicial Circuit of the State of Michigan, decided on January 9, 2004 (Docket no. 98-839576-NI). (82a-83a) *Reed v Yackell (On Remand)*, unpublished opinion of the Circuit Court for the Third Judicial Circuit of the State of Michigan, decided on January 9, 2004 (Docket no. 98-839576-NI), slip op., 7-10. (90a-93a)

The Court remanded the case for the Court of Appeals to reconsider "whether [the Assistant] was an employee within the meaning of MCL 418.161(1)(l) and (n) in light of the [Circuit Court] findings of fact [on remand] . . ." *Reed v Yackell*, 469 Mich 1051; 679 NW2d 71 (2004). (94a)

The Court of Appeals affirmed on remand. *Reed v Yackell (On Remand)*, unpublished opinion of the Court of Appeals, decided on June 8, 2004 (Docket no. 236588). (95a-104a)

The Court granted leave to appeal and invited the Workers' Compensation Section of the State Bar of Michigan (Compensation Section) to file a brief amicus curiae on the question of "whether [the Assistant] was an employee within the meaning of MCL 418.161(1)(l) and (n)." *Reed v Yackell*, 472 Mich - ; - NW2d - (2005). (105a)

SUMMARY OF ARGUMENT

The decision by the Court about the subject matter jurisdiction of a circuit court to answer a question arising under the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101, et seq., in the case of *Szydlowski v Gen Motors Corp*, 397 Mich 356; 245 NW2d 26 (1976) was correct. *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 444 (1984), reh den 419 Mich 1213 (1984) was not and must be overruled.

ARGUMENT

I

A CIRCUIT COURT MAY NOT DECIDE WHETHER A PERSON IS AN *EMPLOYEE* WITHIN THE RUBRIC OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 BECAUSE A STATUTE ALLOWS SUBJECT MATTER JURISDICTION TO ONLY A WORKERS' COMPENSATION MAGISTRATE.

The authority of a court to answer a question is commonly known as subject matter jurisdiction as the Court ruled in the case of *Sovereign v Sovereign*, 354 Mich 65, 71; 92 NW2d 585 (1958) (SMITH, J., concurring),

> "in an action *in personam* (as distinguished from an action *in rem*, or *quasi in rem*, with neither of which we are here concerned) a court must have jurisdiction over the person and jurisdiction over the subject matter. As to the former, a defendant may assert that he was never properly served, a problem of some complexity with respect to persons who exist only in the eyes of the law, such as corporations. No claim of defect in service is made here. As to subject matter, 'jurisdiction' is concerned with the type of action the court is empowered to hear and decide."

Subject matter jurisdiction may be considered de novo on any occasion for it is the foundation for a court to answer any question propounded by a party. *Ward v Hunter Machine Co*, 263 Mich 445; 248 NW 864 (1933). *In re Estate of Fraser*, 288 Mich 392; 285 NW 1 (1939). *Fox v Bd of Regents of the Univ of Mich*, 375 Mich 229; 134 NW2d 146 (1965). The Court held in the case of *Ward, supra*, 449, that,

> "the judgment of a court having jurisdiction of the subject-matter and of the parties is, unless appealed from, final and conclusive. By jurisdiction is meant the authority which

> the court has to hear and determine a case. Jurisdiction lies at the foundation of all legal adjudications. The court must have cognizance of the class of cases to which the one to be adjudicated belongs; it must have jurisdiction of the parties, and the question decided must be within the issue. *Reynolds v. Stockton*, 140 U.S. 254 (11 Sup. Ct. 773)."
>
> In the case of *In re Estate of Fraser, supra*, 394, the Court held that,
>
> "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding. (citations omitted) Jurisdiction cannot rest upon waiver or consent. (citations omitted)"
>
> And in the case of *Fox, supra*, 242-243, the Court ruled that,
>
> "Jurisdiction and venue are not the same thing. Lack of proper venue under the new General Court Rules can be corrected by transfer of a cause to the proper forum; lack of jurisdiction cannot.
>
> When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void."

See also, *Warda v City of Flushing City Council*, 471 Mich 907, 908; 688 NW2d 283 (2004) (CORRIGAN, C.J., concurring).

No court has inherent subject matter jurisdiction. Rather, subject matter jurisdiction is established only by the authority creating the court as the Court ruled in the case of *City of Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973) by stating that, "Jurisdiction does not 'inhere' in a court, it is conferred upon it by the power which creates it."

The constitution creates the courts for the state and establishes the subject matter jurisdiction of each. The constitution creates the Court; the Court of Appeals; a court of general jurisdiction, a circuit court; and courts of limited jurisdiction such as a probate court. Const 1963, art VI, sec 1. VI (1). This provision of the constitution states that,

> "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house."

The subject matter jurisdiction of the Court is described by Const 1963, art VI, sec 1. VI (4) which states that, "The supreme court shall have general superintending control over all courts; power to issue, hear and decide prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge."

The subject matter jurisdiction of the Court of Appeals is the jurisdiction which is described by legislation or the rules of the Court as Const 1963, art VI, sec 1. VI (10) states that, "The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by the rules of the supreme court."

The subject matter jurisdiction of a circuit court is described by Const 1963, art VI, sec 1. VI (13) which states that,

> "The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court."

A. A STATUTE IN THE WDCA PROHIBITS THE CIRCUIT COURT FROM SUBJECT MATTER JURISDICTION OVER ANY QUESTION ARISING UNDER THE WDCA.

A statute in the WDCA actually prohibits a circuit court from subject matter jurisdiction to decide any question arising under the WDCA by assigning jurisdiction to the Workers' Compensation Agency (Agency) or a workers' compensation magistrate of the Board of Magistrates (Magistrate). MCL 418.841(1). Section 841(1), first sentence, states that, "Any dispute or controversy concerning compensation or other benefits shall be

submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable."

The text *all questions arising under this act . . .* is clear.

All is commonly and properly used as a predeterminer to refer to the whole quantity of a particular group. It prohibits any limitation or exclusion from the group. *The Oxford American College Dictionary* (Oxford University Press 2002). The Court has previously recognized this very usage of *all* in *all questions arising under this act.* In the case of *Jesionowski v Allied Products Corp*, 329 Mich 209, 212; 45 NW2d 39 (1950), the Court said that, "it seems clear that the legislature has vested plenary power in the compensation commission [which is now a magistrate], as a quasi-judicial agency, to determine all essential factual issues."

Question is commonly and properly used as a noun which describes an issue or a controversy. *Oxford American College Dictionary*. The Court has recognized this usage in the case of *McFarlane v Clark*, 39 Mich 44, 46; 33 AR 346 (1878) when stating that, "a question implies something in controversy, or which may be the subject of controversy . . ."

A *question* may be propounded until there is a final decision by a Magistrate. The voluntary payment of compensation does not preclude a *question arising under this act* because a statute in the WDCA states that, "Neither the payment of compensation or the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act." MCL 418.831. Also, settlement of a claim for compensation does not preclude a *question arising under this act. Bugg v Fairview Farms, Inc*, 385 Mich 338, 353; 189 NW2d 291 (1971). There, the Court observed,

> "an agreement of redemption admit the jurisdiction of the commission only for the purpose of approving the agreed payment.
>
> See generally *Jacobson* v. *Miller* (1879), 41 Mich 90, 96 and *Bond* v. *Markstrum* (1894), 102 Mich 11, 17.

> We hold that in light of the agreement of the parties to the compensation case that the disputed conditions of liability under the act would be reserved for determination in this law action, these defendants are estopped to raise the claim of release under MCLA § 416.1 (Stat Ann 1968 Rev § 17.212). We regard the payment by the employer pursuant to the redemption agreement under the circumstances of this case as tantamount to a voluntary payment as in *Holcomb* v. *Bullock* (1958), 353 Mich 514 and hold that it may not be pleaded in bar in the instant lawsuit."

Nothing in section 841(1), first sentence, limits who may propound a *question arising under this act*. Obviously, a person seeking compensation from another may raise a question whether a worker, *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220; 666 NW2d 199 (2003), reh den 469 Mich 1224; 669 NW2d 815 (2003); a survivor of a deceased worker, *McLaughlin v Antrim Co Rd Comm*, 266 Mich 73; 253 NW 221 (1934); an auto "no-fault" carrier, *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53; 658 NW2d 460 (2003); or a group insurance carrier or physician, *Ptak v Penwalt Corp*, 112 Mich App 490; 316 NW2d 251 (1982). However, a person such as an employer seeking to reduce or end a responsibility for compensation may raise a *question arising under this act*. *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 634-635; 242 NW2d 393 (1976). And a court may propound a *question arising under this act* for the Agency or Magistrate to answer. See, e.g., *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995).

Arising under this act is clear because of *this*. *This* is a deictic used to point a reader directly to an antecedent which is known as an identifiable referent and which is usually a noun. *A Dictionary of Modern Legal Usage* (Oxford University Press, 2nd ed 1995). *The New Fowler's Modern English Usage* (Clarendon Press Oxford, rev ed 1998). The identifiable referent which *this* signals in section 841(1), first sentence, is the noun *act*.

The identifiable referent *act* in section 841(1), first sentence, is the antecedent which is described by section 101 that states that, "This act shall be known and may be cited as the 'worker's disability compensation act of 1969.'"

It is the text *this act* which requires the Agency or Magistrate to decide every question about the meaning and application of every statute in the WDCA. It is also the text *this act* which prohibits the Agency or Magistrate from deciding a question about the constitutionality of a statute in the WDCA or about the application and meaning of a statute in another code. A question about the validity of a statute in the WDCA is one arising under the constitution, not the WDCA, as the Court held in the case of *Dation v Ford Motor Co*, 314 Mich 152, 160; 22 NW2d 252 (1946),

> "In functioning under the workmen's compensation law the department of labor and industry acts in a fact-finding capacity. Its powers and duties are not judicial in character but rather are merely quasi judicial. Generally speaking, an administrative board, commission or department possessing powers of such character does not undertake to determine constitutional questions. In *Flanigan* v. *Reo Motors, Inc., supra*, counsel sought to raise before the department the constitutionality of the section here involved. The department, however, declined to pass on the matter indicating its view of the situation, and its general policy, in the following statement:
>
> 'The department of labor and industry is a fact-finding commission and in view of the fact that this is a constitutional question under the law, it comes within the province of the judicial tribunal provided by law.'
>
> Counsel for defendant also cite part 3, § 16 (2 Comp. Laws 1929, § 8455), of the workmen's compensation law as amended by Act No. 245 Pub. Acts 1943 (Comp. Laws Supp. 1945, § 8455, Stat. Ann. 1945 Cumm. Supp. § 17.190), which in terms requires that all questions raised under the act shall be determined by the department. It is argued that the language used is sufficiently comprehensive to include a question of the character involved in the case at bar. With such claim we are unable to agree. Commenting on the statute, it was said by this court in *Michigan Mutual Liability Co.* v. *Baker*, 295 Mich. 237:
>
> 'While the department has jurisdiction to determine 'all questions' (2 Comp. Laws 1929, § 8455 [Stat. Ann. § 17.190]) arising under the compensation law, it must be borne in mind that it is an administrative tribunal only and not a court possessing general equitable and legal powers. *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8.'
>
> Reference in the statute cited to 'All questions arising under this act,' must be given an interpretation consistent with the powers vested in the department. It was unquestionably the intention

> of the legislature that the department in its factfinding capacity should pass on factual issues presented in proceedings brought under the workmen's compensation law. The limitations on the power of the department, under the section cited by defendant, are clearly indicated by the language above quoted from *Michigan Mutual Liability Co.* v. *Baker, supra,* cited with approval in *Stuart v. Spencer Coal Co.*, 307 Mich. 685."

A question about the application and meaning of a statute in another code concerning the rights of an employee that are not based on a *personal injury* is one arising under that other code, not the WDCA. *Moore v Federal Department Stores, Inc*, 33 Mich App 556; 190 NW2d 262 (1971). *Milton v Oakland Co*, 50 Mich App 279; 213 NW2d 250 (1973). *Slayton v Michigan Host, Inc*, 122 Mich App 411; 332 NW2d 498 (1983). The Court of Appeals accurately held in *Slayton, supra,* 416-417, that an employer could not invoke the immunity from civil suit established by the WDCA, MCL 418.131(1), because humiliation, embarrassment, damage to a career and professional esteem were from a *discrimination* injury which is intangible and not a *personal* injury which is tangible,

> " . . . a victim of discrimination may bring a civil suit to recover for damages for any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish which flow from the *discrimination* injury. Such claims are not barred by the exclusive-remedy clause of the Workers' Disability Compensation Act because they are independent of any disability which might be compensable under the act. These types of injuries are the kind that the Elliott-Larsen Civil Rights Act was designed to protect against and the hold otherwise would undercut the legislative scheme to remedy discriminatory wrongs. [citations omitted]" (emphasis supplied)

See also, *Boscaglia v Mich Bell Tel Co*, 420 Mich 308; 362 NW2d 642 (1984).

Shall be determined by the bureau or a worker's compensation magistrate is clear. The *bureau* is the Bureau of Workers' Compensation which was created by a statute in the WDCA, MCL 418.201, and reorganized and named the Agency by executive order. Exec Reorg Order no. 2003-1, section 445.2011(O)(2). This order states that,

> "Any authority, powers, functions, duties and responsibilities of the Bureau of Worker's Compensation transferred to the Bureau of Worker's and Unemployment Compensation under Executive Order 2002-1, MCL 445.2004, are transferred from the Bureau

> of Worker's and Unemployment Compensation to the Workers' Compensation Agency."

A *worker's compensation magistrate* is a magistrate qualified by a statute in the WDCA, MCL 418.210(1)(a) - (d), (2) and (3), and appointed by the Governor to serve on the Board of Magistrates by a statute in the WDCA, MCL 418.210(4), a board which is created by a statute in the WDCA, MCL 418.213(1).

It is imperative that either the Agency or Magistrate decide any *question arising under this act. Shall be* in *all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate* is imperative and prohibits any choice from the exercise of discretion. *Sauder v Dist Bd of Sch Dist no. 10, Twp of Royal Oak, Oakland Co*, 271 Mich 413; 261 NW 66 (1935). *Twp of Southfield v Drainage Bd for Twelve Towns Relief Drains*, 357 Mich 59, 76-77; 97 NW2d 821 (1959). *Transamerica Freight Lines, Inc v Quimby*, 381 Mich 149, 158-159; 160 NW2d 865 (1968). The Court said in the case of *Sauder, supra*, 418, that,

> "The act uses the word 'shall' and the principal question is whether or not the word so used shall be given its literal meaning. In *City of Madison* v. *Daley*, 58 Fed. 751, the court held that the word 'shall' as used in a statute, will be construed as meaning 'may' where no public or private right is impaired by such construction; but where the public are interested, or where the public or third persons have a claim *de jure* that the act shall be done, it is imperative, and will be construed to mean 'must.'"

Shall be in section 841(1), first sentence, is imperative and is not permissive by describing the very function of the Agency and Magistrate which are public institutions.

B. THE STATUTE IS CONSISTENT WITH THE STATUTES IN THE WDCA THAT CONCERN THE AGENCY AND MAGISTRATE.

Section 841(1), first sentence, is quite consistent with other statutes in the WDCA. Certainly, there is no conflict between the text *all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate* and the text of other statutes in the WDCA which describe the function of the Agency and Magistrate that

might create an ambiguity in the law. *Mayor of the City of Lansing v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

Section 841(1), first sentence, is consistent with the two statutes in the WDCA requiring that a Magistrate hear *any dispute or controversy* and decide that with a written order and opinion establishing the facts and applying the law. MCL 418.847(1), (2). Section 847(1), first and second sentences, require a Magistrate to hear *any dispute or controversy* by stating that,

> "Except as otherwise provided for under this act, upon the filing with the bureau by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable. A worker's compensation magistrate shall hear a case that is set for hearing."

Any dispute or controversy is the same as *all questions arising under this act.*

Section 847(2), first sentence, requires a written order and opinion from a Magistrate to authoritatively answer the questions presented by stating that,

> "For cases in which an application for a hearing under this section is filed after March 31, 1986, the worker's compensation magistrate, in addition to a written order, shall file a concise written opinion stating his or her reasoning for the order including any findings of fact and conclusions of law."

Section 847(2), first sentence, is consistent with section 841(1), first sentence, by describing *how* any question can be reliably answered by a Magistrate having subject matter jurisdiction. Indeed, it is the written order and opinion rendered by the Agency or Magistrate that authoritatively answers a question about eligibility of a person for compensation from another by the terms of the rule of res judicata. *Askew v Ann Arbor Pub Schools*, 431 Mich 714; 433 NW2d 800 (1988). The Court observed in the case of *Askew, supra*, 723-724, that,

> "The findings of fact of a magistrate are to be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record.

> Under the new procedure established by Act 103, authorization for the taking of additional evidence on review to establish a change in physical condition has been eliminated. The appellate commission 'may remand a matter to a worker's compensation magistrate for purposes of supplying a complete record if it is determined that the record is insufficient for purposes of review.' The determinative date for res judicata purposes under the new procedure will be the hearing before the magistrate."

Section 841(1), first sentence is consistent with the statute in the WDCA which describes the venue for a compensation case. MCL 418.851, first and third sentences, state that, "The worker's compensation magistrate at the hearing of the claim shall make such inquiries and investigations as he or she considers necessary. * * * *The hearing shall be held at the locality where the injury occurred* and the order of the worker's compensation magistrate shall be filed with the bureau." (emphasis is supplied)

Plainly, section 841(1), first sentence, and section 851, first and third sentences, are equally needed and complement one another as the former establishes the subject matter jurisdiction of the Agency and Magistrate while the former describes the venue for a compensation case. *Fox, supra*, 242.

And section 841(1), first sentence, is consistent with these statutes in the WDCA that allow for review and decision of a *question arising under this act* on appeal. Statutes in the WDCA allow an appeal from an order by the director of the Agency to a Magistrate on the subject of vocational rehabilitation, MCL 418.319(2), and to the Workers' Compensation Appellate Commission (Commission) from an order on the subject of a settlement, MCL 418.837(1) - (2). Section 319(2) states that, "If a dispute arises between the parties concerning application of any of the provisions of subsection (1) [by the director of the Agency], any of the parties may apply for a hearing before a . . . worker's compensation magistrate . . ."

Section 837(1) - (2) states that,

> "All redemption agreements and lump sum applications filed under the provisions of section 835 shall be approved or rejected by a worker's compensation magistrate.
>
> (2) The director may, or upon the request of any of the parties to the action shall, review the order of the worker's compensation magistrate entered under subsection (1). In the event of review by the director and in accordance with such rules as the director may prescribe and after hearing, the director shall enter an order as the director considers just and proper. Any order of the director under this subsection may be appealed to the appellate commission within 15 days after the order is mailed to the parties."

Other statutes in the WDCA allow an appeal from an order by a Magistrate to the Commission and a decision by the Commission to the Court of Appeals and then, the Court. MCL 418.859a. MCL 418.861a(14). Section 859a establishes that only the Commission may review a decision by the Magistrate by stating that,

> "Except as otherwise provided for in this act, a claim for review of a case for which an application under section 847 is filed after March 31, 1986 shall be filed with the appellate commission. A claim for review shall be filed with the commission not more than 30 days after the date the order of the worker's compensation magistrate or director is sent to the parties. For sufficient cause shown, the commission may grant further time in which to claim a review."

Section 861a(14), second sentence, allows the Court of Appeals and the Court subject matter jurisdiction to decide a question of law after disposition by the Commission,

> "The court of appeals and the supreme court shall have the power to review questions of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method permissible under the Michigan court rules."

See, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698-701; 614 NW2d 607 (2000).

Section 841(1), first sentence, together with all of these statutes about appeal prohibit subject matter jurisdiction to a circuit court to decide any question arising under the WDCA on appeal from a decision by the Agency or Magistrate. *Owens v Active Metal Co*, 38 Mich App 234; 196 NW2d 8 (1972). There, a party filed an appeal with a circuit court

to appeal a decision by the Workers' Compensation Appeal Board (succeeded by the Commission) which was dismissed for lack of appellate jurisdiction by a circuit court.

The decision by the Court in the case of *Mudel, supra*, 702, n 5, explains why a circuit court should not have any involvement in any *question arising under this act*,

---

"[7] This distinction between the administrative and judicial standards of review flows from the long-recognized principle that administrative agencies possess expertise in particular areas of specialization. Because the judiciary has neither the expertise nor the resources to engage in a fact-intensive review of the entire administrative record, that type of detailed review is generally delegated to the administrative body. In the particular context of worker's compensation cases, a highly technical area of law, the judiciary lacks the expertise necessary to reach well-grounded factual conclusions. Worker's compensation cases typically involve lengthy records replete with specialized medical testimony. These cases require application of extremely technical and interrelated statutory provisions that determine an employee's eligibility for disability benefits. The judiciary is not more qualified to reach well-grounded factual conclusions in this arena than the administrative specialists. Therefore, the Legislature has decided that factual determinations are properly made at the administrative level, as opposed to the judicial level.

Further, the courts simply cannot review the record in every worker's compensation case in the detail required to make conclusions about the sufficiency of the magistrate's decision. Worker's compensation cases are typically fact intensive, involving lengthy deposition testimony and medical documentation. If the courts were to attempt a review of each and every worker's compensation case with an eye toward making detailed factual conclusions, dockets would become impossibly burdened with worker's compensation cases, further delaying the resolution of injured workers' claims for benefits. These considerations—lack of appropriate expertise and resources—demonstrate the practical benefits flowing from the Legislature's creation of a two-tier reviewing process, which delegates to the WCAC the role of ultimate factfinder, while limiting the judiciary to the role of guardian of procedural fairness."

C. THE STATUTE IS CONSISTENT WITH THE STATUTES IN THE WDCA THAT CONCERN THE CIRCUIT COURT.

Section 841(1), first sentence, is also entirely consistent with those statutes in the WDCA assigning particular subjects for action by a circuit court. Section 131(1). MCL 418.645(1). MCL 418.827(6). MCL 418.853. MCL 418.863.

Section 131(1) assigns a circuit court subject matter jurisdiction to decide a question about the *intent of an employer to injure an employee* by stating that,

> "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *The issue of whether an act as an intentional tort shall be a question of law for the court.* This subsection shall not enlarge or reduce rights under law." (emphasis supplied)

This statute is consistent with section 841(1), first sentence, for *the intent of an employer to injure an employee* is not a *question arising under this act.* An employer is responsible for compensation without regard to culpability or "fault." The responsibility of an employer for compensation is based on contract, not duty. *Andrewski v Wolverine Coal Co*, 182 Mich 298; 148 NW 684 (1915). *McAvoy v HB Sherman Co*, 401 Mich 419; 258 NW2d 414 (1977), reh den 402 Mich 953 (1977). The Court said in the case of *McAvoy, supra*, 437, that, "Any worker's compensation schema has . . . as its primary goal the delivery of sustaining benefits to a disabled employee as soon as possible after an injury occurs, regardless of any traditional tort concepts . . ."

Section 645(1) allows a circuit court the subject matter jurisdiction to impose sanctions on a person who has not secured the responsibility for compensation by stating that,

> "The director may file a complaint in the circuit court for the county in which the employer is located, or in the circuit court for Ingham county, requesting the relief permitted by this section against an employer that has failed, at any time within

> the immediately preceding 3 years, to comply with section 611."

This statute is consistent with section 841(1), first sentence, because it applies only after the director of the Agency has decided that a person is an *employer* within the meaning of the WDCA who has not secured or insured the responsibility for compensation by the terms of MCL 418.611(1)(a) - (b), (2) or (4). That is, the director of the Agency must first assert subject matter jurisdiction by the authority of section 841(1), first sentence, then, answer the question of whether a person is an *employer* and has not obtained insurance, before proceeding into the circuit court to implement the decision. This means there is no question *arising under this act* for the circuit court to decide.

MCL 418.827(1), first sentence, allows an injured employee to receive compensation and sue anyone else for damages except the employer and a fellow employee.[2] Section 827(1), last sentence, and MCL 418.827(3),[3] allow the employer to join that lawsuit. When the injured employee and the employer both sue a tortfeasor,

---

[2] Section 827(1), first sentence, mirrors section 131(1) by stating that,

> "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section."

[3] Section 827(1), last sentence, and section 827(3) state,

> "Any party in interest shall have a right to join in the action."

and

> "Settlement and release by the employee is not a bar to action by the employer or carrier to proceed against the third party for any interest or claim it might have."

section 827(6) requires that the circuit court apportion the costs of the lawsuit between those two plaintiffs by stating that,

> "Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effectuating recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. Expenses of recovery shall be apportioned by the court between the parties as their interests appear at the time of recovery."

The Court of Appeals has recognized *the court* in section 827(6), second and third sentences, is the circuit court in which the injured employee and employer had sued the tortfeasor. *Mead v Peterson-King Co*, 24 Mich App 530, 534; 180 NW2d 304 (1970), lv den 384 Mich 832 (1971).

This is entirely consistent with section 841(1), first sentence, because any question about the amount of the allowable costs and reasonable fee of counsel for a plaintiff employee and co-plaintiff employer in a lawsuit against a tortfeasor is a question arising under the Michigan Court Rules of 1985 (MCR), MCR 1.101, et seq., and not the WDCA.

Section 853 allows a circuit court to impose sanctions on a person held in contempt by the Agency or Magistrate by stating that,

> "Process and procedure under this act shall be as summary as reasonably may be. The director, worker's compensation magistrates, arbitrators, and the board shall have the power to administer oaths, subpoena witnesses, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any witness who refuses to obey a subpoena, who refuses to be sworn or testify, or who fails to produce any papers, books, or documents touching any matter under investigation or any witness, party, or attorney who is guilty of any contempt while in attendance at any hearing held under this act may be punished as for contempt of court. *An application for this purpose may be made to any circuit court within whose jurisdiction the offense is committed* and for which purpose the court is given jurisdiction." (emphasis supplied)

Section 853 does not conflict with section 847(1), first sentence, because it concerns the enforcement of a decision by a Magistrate that contumacious conduct occurred

which is not a question about compensation. *In re contempt of Robertson*, 209 Mich App 433, 439; 531 NW2d 763 (1995).

Section 863 allows a circuit court the subject matter jurisdiction to enforce a final order of a Magistrate by stating that,

> "Any party may present a certified copy of an order of a worker's compensation magistrate, an arbitrator, the director, or the appellate commission in any compensation proceeding to the circuit court for the circuit in which the injury occurred, or to the circuit court for the county of Ingham if the injury was sustained outside this state. The court, after 7 days' notice to the opposite party or parties, shall render judgment in accordance with the order unless proof of payment is made. The judgment shall have the same effect as though rendered in an action tried and determined in the court and shall be entered and docketed with like effect."

As section 645(1) and section 853, last sentence, section 863 is consistent with section 841(1), first sentence, as it can apply only after a Magistrate has answered the *questions arising under this act* in final order and opinion.

Courts have recognized that a circuit court has no subject matter jurisdiction to decide a question arising under the WDCA in a proceeding based on section 863. *Scalzo v Family Creamery Co*, 308 Mich 587; 14 NW2d 505 (1944). *Simm v City of Dearborn*, 54 Mich App 263; 220 NW2d 768 (1974). In the case of *Simm, supra*, 265, the Court of Appeals aptly recognized that section 863,

> "leaves the trial court with no discretion absent proof of payment. Proof of payment was not offered by the defendant. Only a claim of setoff, which should have been raised in the workmen's compensation proceeding, was made. The circuit court properly refused to consider the claim for setoff which the city waived by its failure to assert it in the prior proceeding."

D. THE STATUTE IS CONSISTENT WITH THE REVISED JUDICATURE ACT OF 1961.

The Revised Judicature Act of 1961 (RJA), MCL 600.101, et seq., allows a circuit court subject matter jurisdiction four ways. MCL 600.601(1)(a) - (c), (2). Section 601(1)(a) - (c) and (2) state that,

> "The circuit court has the power and jurisdiction:
>
> (a) Possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (b) Possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (c) Prescribed by the rules of the supreme court."

and

> "The circuit court has exclusive jurisdiction over condemnation cases commenced under the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630."

A question *arising under this act* is not a question which is within the rubric of section 601(1)(a) or (b) because the WDCA is a complete departure from the common law and equity jurisprudence. The Court recognized this in the very first case involving the WDCA, *Andrewski, supra*, 302-303,

> "The act in question, like all similar acts, provides for compensation, and not for damages, and in its consideration and construction all of the rules of law and procedure, which apply to recover damages for negligently causing injury or death, are in these cases no longer applicable, and there is substituted a new code of procedure fixed and determined by the act in question. This legislation, then, is a new departure and creates a new liability, resting upon one class in favor of another, without reference to any negligent conduct of the class upon which the burden is cast. In other words, this legislation is wholly in derogation of the common law."

The Court has reiterated this on every occasion the subject has been broached. See, e.g., *Hesse v Ashland Oil Co*, 466 Mich 21, 30-31; 642 NW2d 330 (2002), reh den 466 Mich 1214; 645 NW2d 668 (2002).

There is no rule in the MCR allowing a circuit court to consider any question arising under the WDCA.

And, of course, a question under the WDCA is no question of condemnation.

A statute in the RJA allows a circuit court concurrent subject matter jurisdiction with other courts. MCL 600.401(2)(a) - (f). Section 401(2)(a) - (f) provides that,

> "A plan of concurrent jurisdiction may provide for 1 or more of the following:
>
> (a) The circuit court and 1 or more circuit judges may exercise the power and jurisdiction of the probate court.
>
> (b) The circuit court and 1 or more circuit judges may exercise the power and jurisdiction of the district court.
>
> (c) The probate court and 1 or more probate judges may exercise the power and jurisdiction of the circuit court.
>
> (d) The probate court and 1 or more probate judges may exercise the power and jurisdiction of the district court.
>
> (e) The district court and 1 or more district judges may exercise the power and jurisdiction of the circuit court.
>
> (f) The district court and 1 or more district judges may exercise the power and jurisdiction of the probate court."

The Agency and Magistrate are notably absent from the courts whose subject matter jurisdiction may be shared with a circuit court. Plainly, exclusive subject matter jurisdiction of the Agency and Magistrate from section 841(1), first sentence, is consistent with the subject matter jurisdiction of a circuit court from the RJA.

E. *SZYDLOWSKI v GEN MOTORS CORP*, 397 MICH 356; 245 NW2d 26 (1976) WAS CORRECT.

With one notable exception, the Court has always ruled that the subject matter jurisdiction granted to the Agency and Magistrate by section 841(1), first sentence, is *exclusive* subject matter jurisdiction to decide *all questions arising under this act*. *Munson v Christie*, 270 Mich 94; 258 NW2d 415 (1935). *Jesionowski, supra*. *Morris v Ford Motor Co*, 320 Mich 372; 31 NW2d 89 (1948). *Dershowitz v Ford Motor Co*, 327 Mich 386; 42 NW2d 900 (1950). *Szydlowski v Gen Motors Corp*, 397 Mich 356;

245 NW2d 26 (1976). *Herman v Theis*, 10 Mich App 684; 160 NW2d 365 (1968). The Court held in the case of *Munson, supra*, 100, that,

> "The [WDCA] contains its own procedural provisions. Under these provisions only two classes of persons may (except in cases of minors or incompetents) institute proceedings against the employer before the commission: (1) the injured employee, and (2) his dependents in the event of his death resulting from the injury. By reasonable inference, and we may say almost necessary inference, it follows that each and all of the statutory benefits, if recoverable at all, are to be determined in a proceeding instituted by the injured employee or in the event of his demise by his dependents."

In the case of *Morris, supra*, 374, the Court said, again, that,

> "Plaintiff's claim for compensation alleged an injury arising out of and in the course of his employment. Under the statutes above noted exclusive jurisdiction over the issue thus presented is conferred upon the compensation commission. * * * Whether plaintiff's injury and resultant disability were compensable under the act or not, his claim therefor was within the jurisdiction of the compensation commission." (citations omitted)

In the case of *Dershowitz, supra*, 389, 390, the Court said yet again,

> "When both the employer and employee are subject to the workmen's compensation act and plaintiff's injury arises out of and in the course of his employment, the workmen's compensation commission has *exclusive* jurisdiction to the exclusion of that of the circuit court. This was true in 1929 (CL 1929, § 8410) as it is today (CL 1948, § 411.4 [Stat Ann 1949 Cumm Supp § 17.144]). See *Osborne* v. *Van Dyke*, 311 Mich 86; *Morris* v. *Ford Motor Co.*, 320 Mich 372."

and

> "it must be held that any rights accruing to plaintiff as a result of his injury came within the *exclusive* jurisdiction of the workmen's compensation commission in the first place and that the claimed agreement between the parties, not alleged to have been approved by the commission, was invalid and void." (emphasis supplied)

The Court of Appeals recognized the text of section 841(1), first sentence, and that the decisions by the Court which were uniformly faithful to that text. *Herman, supra*, 690-691. There, the Court of Appeals held that,

> "Jurisdiction for the determination of those issues concerning exclusiveness and conditions of liability initially must lie with the compensation department and plaintiff may not waive such jurisdiction by filing an action at law and merely stating that CLS 1961, § 412.1 (Stat Ann 1960 Rev § 17.151) does not apply to his situation. Rather, the workmen's compensation department is the forum which properly which properly considers questions of employment relationship, injury, and compensation (CL 1948, § 413.16 [Stat Ann 1960 Rev § 17.190]), and it must determine whether its jurisdiction is proper, based on findings of 'exclusiveness' and 'conditions of liability', the decision concerning the jurisdiction then being appealable to the appeal board and the courts, if plaintiff disagrees, as he does here. The question as to 'out of and in the course of' is one of fact, and not of law, and it is the function of the department to consider the facts and circumstances in determining 'exclusive' jurisdiction. (citations omitted)
>
> * * *
>
> To accept plaintiff's argument would be to deny the employer the right to have his liability *as an employer* determined by the forum established *by statute* to determine it whenever the plaintiff believed that the department might not agree that such a relationship existed." (first emphasis, by the court; last, supplied)

The ruling by the Court of Appeals in the case of *Herman, supra,* was questioned by the Court of Appeals in the case of *Szydlowski v Gen Motors Corp,* 59 Mich App 180, 184-185; 229 NW2d 365 (1975) which then went on to say that there was shared or concurrent subject matter jurisdiction between the circuit court and Magistrate. *Szydlowski, supra,* 185-186. The Court of Appeals said in deciding *Szydlowski, supra,* 184-185, 185-186,

> "This question was decided in *Herman v Theis,* 10 Mich App 684; 160 NW2d 365 (1968). In that case this Court held that the workmen's compensation bureau has exclusive jurisdiction to determine whether the act's 'conditions of liability' have been met. However, the continuing vitality of that decision is open to serious question."

and

> "The conclusion is inescapable that the circuit court has concurrent jurisdiction to decide whether a given plaintiff's exclusive remedy is under the Workmen's Compensation Act. If the 'conditions of liability' are found by the circuit judge to

> exist, a motion for summary judgment should be granted, without prejudice to a proper filing for compensation benefits.
>
> We hold that the circuit court does have subject matter jurisdiction, concurrent with the workmen's compensation bureau, to determine whether the exclusive remedy provision, MCLA 418.131; MSA 17.237(131) [applies]."

The *Court* reproved this ruling by the Court of Appeals in *Szydlowski, supra,* that the Magistrate did not have exclusive subject matter jurisdiction,

> "This [ruling by the Court of Appeals that the circuit court has concurrent subject matter jurisdiction] is a clearly erroneous conclusion. In *Solakis v Roberts*, 395 Mich 13, 20; 233 NW2d 1 (1975), we said that when 'an employee's injury is within the scope of the act, workmen's compensation benefits are the exclusive remedy against the employer. MCLA 418.131; MSA 17.237(131).' MCLA 418.841; MSA 17.237(841) provides that 'all questions arising under this act shall be determined by the bureau'." *Szydlowski, supra,* 358,

and affirmed *Herman, supra,* in *Szydlowski, supra,* 359, "*Theis* accurately states the law and reminds us that the procedures for workmen's compensation cases have been statutorily established. It reminds us against a shortcut or circumvention of those procedures."

The Court of Appeals recognized and implemented these rulings by the Court in every subsequent case that arrived from a decision by a circuit court by remanding the case to the Agency or Magistrate for a decision of the question about whether a person was or was not an *employee* or had a *personal injury* within the rubric of the WDCA. *Bednarski v Gen Motors Corp*, 88 Mich App 482; 276 NW2d 624 (1979). *Dixon v Sype*, 92 Mich App 144; 284 NW2d 514 (1979). *Buschbacher v Great Lakes Steel Corp*, 114 Mich App 833; 319 NW2d 691 (1982). *Johnson v Arby's, Inc*, 116 Mich App 425; 323 NW2d 427 (1982). *Houghtaling v Chapman*, 119 Mich App 828; 327 NW2d 375 (1982). The decision by the Court of Appeals in the case of *Buschbacher, supra,* 837-838, 838-839, is representative,

> "Exclusive jurisdiction lies with the bureau even though plaintiff's complaint does not allege or rely on an employment relationship between the parties. *Bednarski, supra, Dixon v Sype*, 92 Mich App 144; 284 NW2d 514 (1979).

> The only exception to the bureau's exclusive jurisdiction is where it is obvious that the cause of action is not based on the employer/employee relationship. In such cases, the circuit court does have authority to reject the claimed applicability of the exclusive remedy provision.
>
> * * *
>
> The bureau has the ultimate determination as to whether defendant's alleged duties arose only as a result of the employment relationship and whether the alleged injury is compensable under the act.
>
> Accordingly, we hold that the trial court erred in deciding that the alleged injury did not arise out of and in the course of the employment relationship. That question must first be decided by the bureau. We reverse the circuit court's order and remand the matter to the circuit court. Plaintiff shall, within 20 days of the release date of this opinion, file with the Bureau of Workers' Disability Compensation an application for a hearing on the question in controversy. If such application is timely filed, the circuit court shall hold the instant action in abeyance pending the decision of the bureau. If the bureau determines that plaintiff's injuries were suffered in the course of her employment, or if plaintiff fails to apply for a bureau determination within 20 days, the circuit court shall grant accelerated judgment to Great Lakes Steel. If the bureau finds the injuries not to be work-related, the circuit court action may proceed. [citations omitted]"

Most recently, these rulings were recognized in *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 370, 371; 508 NW2d 464 (1993) (BRICKLEY, J., concurring), reh den 444 Mich 1203; 511 NW2d 685 (1993). Justice BRICKLEY accurately recognized in the case of *Adams*, *supra*, 370, 371, that,

> "The first issue to be addressed is whether the trial court had jurisdiction to determine that the exclusive remedy provision did not bar this suit on the basis that decedent's injuries did not arise out of and in the course of his employment.
>
> This Court has addressed this issue in *Szydlowski*, *supra*. While undergoing treatment for work-related injuries, the plaintiff in that case died as a result of drugs that were improperly administered by his employer. The Court held that whether the plaintiff's death arose out of employment could only be determined by the workers' compensation bureau. *Id.*, p 359. Although this Court has narrowed the scope of this rule in subsequent cases, when the issue is whether injuries arose 'out

> of and in the course of employment,' the rule remains unchanged: the bureau *must* make the initial determination.
>
> * * *
>
> it is unclear whether the injuries suffered by the decedent in this case arose out of his employment. We observe that a nexus of some sort exists between the decedent's injury and his employment. It is not for this Court to determine whether this nexus is sufficient to bring the injuries suffered under the coverage of the WDCA. Under these circumstances, that determination *must* be made by the bureau." (emphasis supplied)

These rulings by the Court in *Munson, supra, Jesionowski, supra, Dershowitz, supra,* and *Szydlowski, supra,* and the observation by Justice BRICKLEY in the case of *Adams, supra,* are all correct as completely faithful to the text of section 841(1), first sentence.

F. *SEWELL v CLEARING MACHINE CORP,* 419 MICH 56; 347 NW2d 447 (1984) MUST BE OVERRULED.

There is an exception to the decisions by the Court about section 841(1), first sentence, which range from *Munson, supra,* to *Szydlowski, supra. Sewell v Clearing Machine Corp,* 419 Mich 56; 347 NW2d 447 (1984), reh den 419 Mich 1213 (1984). In the case of *Sewell, supra,* 62, the Court held for the first time that a circuit court shared subject matter jurisdiction with the Agency and Magistrate to decide one particular *question arising under this act,* the question of whether a person was or was not an *employee* within the rubric of the WDCA,

> "those general statements suggest that the bureau's jurisdiction takes precedence over that of the circuit court whenever there is an issue concerning the applicability of the Worker's Disability Compensation Act. The rule is not so broad, however. Properly stated, the *Szydlowski* principle is that the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. The courts, however, retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defendant."

This ruling was precipitate having been peremptory. The decision by the Court in the case of *Sewell, supra,* was reached with consideration only of the application for leave

to appeal and an opposing brief. *Sewell, supra*, 59-60. Neither the application for leave to appeal or the opposing brief were scholarly. The Court provided no exposition of section 841(1), first sentence.

The dispatch affected the ruling. The Court failed to apprehend how two facts shaped the question and the authorities to apply. One fact that the Court did not apprehend was the commercial relationship between the three people who were involved in the lawsuit. While the Court reported that there was a commercial relationship of employee-employer between Jon Sewell and Bathey Manufacturing Company and a commercial relationship of parent-subsidiary corporation between Bathey Manufacturing Company and Armco Steel Corporation, *Sewell, supra*, 66, it failed to appreciate that a direct commercial relationship of employee-employer between Jon Sewell and Armco Steel Corporation was not needed and that the Magistrate had the authority to establish that was a direct and an indirect commercial relationship that could demonstrate an employee-employer relationship. *Allen v Kendall Hardware Mill Supply Co*, 305 Mich 163; 9 NW2d 45 (1943). *Solakis v Roberts*, 395 Mich 13; 233 NW2d 1 (1995). In the case of *Solakis, supra*, 26, the Court reiterated the ruling in the case of *Allen, supra*, that an employee could have more than one employer and whether one or another or both were responsible for compensation as an *employer* was actually a question for the Agency or Magistrate to decide. The Court did not so much as imply that a circuit court had any such power. *Solakis, supra*, 26. There, the Court said,

> "In *Allen v Kendall Hardware Mill Supply Co*, 305 Mich 163; 9 NW2d 45 (1943), a dual employer situation, the Court held that the determination of which employer should be liable to pay benefits was a question of fact. While *Allen* utilized the old 'right to control test', this determination should also be a question of fact under the 'economic reality' test. Because only ELP paid plaintiff's wages, there is support in the record for the factual finding, and that finding is conclusive and binding on this Court."

The fact that there was one employee-employer relationship between Sewell and Bathey still required a determination of whether there was another, implied

employee-employer relationship between Sewell and Armco through commercial relation between Armco and Bathey, a determination which *was* a *question arising under this act.*

Another circumstance that the Court reported but did not apprehend was the fact that "Armco had assumed control of the safety program and other operations' at Bathey." *Sewell, supra,* 58.

This circumstance that was described by Sewell and presumed to be a fact by the Court actually ended any question whether Armco was an *employer* because this meant that Armco was an *employer.* MCL 418.131(2). Section 131(2) states that, "As used in this section and section 827 . . . 'employer' includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or . . . a self-insured employer's liability servicing contract."

The statement by Sewell about the operation of the safety program by Armco meant that section 131(2) applied and that Armco *was* an *employer* as a matter of fact and ending any question for either the Magistrate or circuit court.

Finally, the record which was before the Court was not concrete. While it was known that Sewell had received compensation, it was not known whether this payment was voluntary or by an order of a Magistrate. *Sewell, supra,* 66, 66, n 3. There, Justice Levin recounted that,

> "On May 10, 1976, Sewell injured his hand while working on a drill press machine during the course of his employment with Bathey Manufacturing Company. He commenced an action against Bathey, but the Court of Appeals affirmed the circuit court's conclusion that jurisdiction of that action was vested exclusively in the bureau. Sewell received workers' compensation benefits from Bathey.[3]
>
> * * *

---

[3] It does not appear whether the benefits were paid voluntarily or following a determination by a referee or the Workers' Compensation Appeal Board."

The gap in the record was important. There would be no *question arising under this act* for the Magistrate *or* a circuit court were there a prior adjudication by a Magistrate for that would have been res judicata of whether Sewell was or was not an *employee* of Bathey or Armco. *Askew, supra*. There would have been a *question* about the subject matter jurisdiction for the Court to decide in the case of *Sewell, supra, only if* the compensation had been voluntarily paid to Sewell because of section 418.831.

Rather than recognize this gap in the record and resolve it before considering the issue about subject matter jurisdiction, the Court deliberately ignored it. The Court said absolutely nothing about the payment of compensation when recounting the facts in *Sewell, supra*, 58,

> "On May 10, 1976, while an employee of Bathey Manufacturing Company, the plaintiff was seriously injured in an industrial accident. In 1978, he filed a complaint in the Wayne Circuit Court, alleging that the accident had occurred as a result of the wrongful conduct of two defendants whose relationship to this case we need not consider here. An amended complaint added Armco Steel Corporation as a defendant. The plaintiff alleged that Armco had 'assumed control of the safety program and other operations' at Bathey, and that Armco 'operated some functions [of Bathey] and its manufacturing plant for profit at the direction and control of agents and employees of Armco'.
>
> Armco responded with a motion for accelerated judgment in which it stated that *it* was the plaintiff's employer and that the plaintiff's exclusive remedy against it was to seek workers' disability compensation benefits. MCL 418.131; MSA 17.237(131). Armco later filed an amended motion for accelerated judgment in which it stated that Bathey was its wholly owned subsidiary. In the amended motion, Armco recited that the plaintiff thought Bathey to be the employer while Armco thought itself to the be the employer." (emphasis by the Court)

The ruling by the Court in the case of *Sewell, supra*, was wrong having not attended to the clear text of section 841(1), first sentence. The Court did not even cite section 841(1), first sentence.

Also, the Court incorrectly redacted the extant case exposition of section 841(1), first sentence. In deciding the case of *Sewell, supra*, the Court recited the decision by the Court of Appeals about the extant rule but then declared it "not so broad,"

> "Taken alone, those general statements suggest that the bureau's jurisdiction takes precedence over that of the circuit court whenever there is an issue concerning the applicability of the Worker's Disability Compensation Act. The rule is not so broad, however."

Actually, the rule IS "so broad" as the text of section 841, first sentence, is as broad as could ever be by using *all* in *all questions arising under this act* and is entirely imperative by using *shall be* in *all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate*. Certainly, the Court offered no explanation for how the text *all* could be limited or *shall be* was permissive.

Indeed, the Court attended to the meaning of the ruling in the case of *Szydlowski, supra*, by stating in *Sewell, supra*, 62,

> "The rule is not so broad, however. Properly stated, the *Szydlowski* principle is that the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. The courts, however, retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defendant. This distinction was noted in *Northern v Fedrigo*, 115 Mich App 239, 241; 320 NW2d 230 (1982), and is clearly illustrated by *Nichol v Billot*, 406 Mich 284; 279 NW2d 761 (1979), in which this Court discussed nat some length how *the court* (judge and jury) is to go about determining whether a plaintiff is a fellow employee of the defendant." (emphasis by the Court)

This exposition of the decision by the Court in the case of *Szydlowski, supra*, in *Sewell, supra*, was not at all accurate. In the case of *Szydlowski, supra*, 357-358, the Court bluntly reproved the decision by the Court of Appeals that a circuit court had concurrent jurisdiction with the Agency or Magistrate. It is problematic how the Court could cite the decision in this case of *Szydlowski, supra*, which bluntly invoked the text of section 841(1), first sentence, to DENY any subject matter jurisdiction to a circuit court to ALLOW concurrent jurisdiction.

The citation of *Nichol v Billot*, 406 Mich 284; 279 NW2d 761 (1979) by the Court in the case of *Sewell, supra*, 62, is just as problematic. The Court decided two issues in the case of *Nichol, supra*. One was the rule to decide whether a person was an *employee* within the rubric of the WDCA and the other was whether a judge or jury in a circuit court could decide the fact. *Nichol, supra*, 292-293,

> "We granted leave to consider the following two issues:
>
> (1) In a tort action where the defendant relies on the affirmative defense that the plaintiff's exclusive remedy is under the Worker's Disability Compensation Act and the basis of such affirmative defense is the co-employee status of the plaintiff and defendant, what is the proper test by which to determine whether the plaintiff and the defendant are co-employees; and
>
> (2) Whether the question of defendant's status is an issue of law for the court or an issue of fact for the jury. 402 Mich 922 (1978)."

In the case of *Nichol, supra*, there was absolutely no concern about the question of whether a circuit court had subject matter jurisdiction to decide one way or the other. It appears that the Court simply assumed that a circuit court actually had subject matter jurisdiction. However, the subject matter jurisdiction of a court cannot be presumed or waived. *City of Detroit, supra*. *In re Estate of* Fraser, *supra*.

The ruling by the Court in the case of *Sewell, supra*, about concurrent subject matter jurisdiction conflated section 401(2)(a) - (f) in the RJA. The ruling by the Court in the case of *Sewell, supra*, effectively amended section 401(2)(a) - (f) to add to the power of a circuit court which is not proper. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998), "the Legislature can and may re-write the statute, but we will not . . ."

Concurrent subject matter jurisdiction has only facile appeal. The real effects are pernicious. Concurrent subject matter jurisdiction allows for two different answers to one question of whether a person is or is not an *employee* within the meaning of the WDCA. And this consequence cannot be avoided by ruling that any potential subject matter

jurisdiction of one is preempted by assertion of the jurisdiction of the other when the question is propounded there. Such a rule only starts a race between the parties to propound the question in violation of the principle that jurisdiction cannot be effected by the action of a party. *In re Estate of Fraser, supra.*

The Court must overrule *Sewell, supra,* and *Nichol, supra.*

G. WHETHER A PERSON IS AN *EMPLOYEE* IS A *QUESTION ARISING UNDER THIS ACT* FOR A MAGISTRATE.

A question of whether a person was or was not an *employee* of another person within the rubric of the WDCA *is* a *question arising under this act.* With the exceptions of *Nichol, supra,* and *Sewell, supra,* every case decided by the Court on the subject was first submitted to and decided by a Magistrate. *Andrewski, supra. Blust v Sisters of Mercy,* 256 Mich 1, 12-13; 239 NW 401 (1931). *Tata v Muskovitz,* 354 Mich 695, 696; 94 NW2d 71 (1959). *Askew v Macomber,* 398 Mich 212, 216-217; 247 NW2d 288 (1976). *Betts v Ann Arbor Pub Schs,* 403 Mich 507, 510-512; 271 NW2d 498 (1978). *Higgins v Monroe Evening News,* 404 Mich 1, 11-12; 272 NW2d 537 (1978). *Nichol, supra,* 291-292. *Hoste v Shanty Creek Mgt, Inc,* 459 Mich 561, 565-569; 592 NW2d 360 (1999), reh den 460 Mich 1201; 598 NW2d 336 (1999). *Oxley v Dept of Military Affairs,* 460 Mich 536, 538-540; 597 NW2d 89 (1999).

Indeed, the character of the question propounded by the Court in *this* case is indeed, a *question arising under this act.* The question propounded by the Court is whether the Assistant was "an employee within the meaning of MCL 418.161(1)(l) and (n)," *Reed v Yackell,* 472 Mich - ; - NW2d - (2005), which is a *question arising under this act* because MCL 418.161(1)(l) and (n) are statutes in the WDCA.

The order of the Court that remanded the case for the Circuit Court to establish "whether [the Assistant] was an employee in the service of [the Employee or the Company] under any contract of hire" and "whether [the Assistant] maintained a separate business as

a day-laborer," *Reed v Yackell*, 469 Mich 960; 671 NW2d 42 (2003), is not binding after remand. While the Circuit Court and Court of Appeals had to fulfill the mandate of *Reed, supra*, as the law of the case, *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454-455; 302 NW2d 164 (1981), reh den 411 Mich 1119; 306 NW2d 311 (1981), the Court is not so confined after remand. The mandate was not a ruling on the question of subject matter jurisdiction. Indeed, a peremptory disposition of an application for leave to appeal cannot be a rule free from subsequent determination after remand. See, *Tebo v Havlik*, 418 Mich 350, 377, n 9, 379-381, 379-381, n 17; 343 NW2d 181 (1984) (LEVIN, J., dissenting), reh den 419 Mich 1201 (1984). Justice LEVIN observed in *Tebo, supra*, 380, n 17, that,

> "[7] The denial of an application for leave to appeal does not constitute an expression of opinion regarding the analysis or conclusion of the Court of Appeals. See fn 11. In *Jones v Keetch*, 388 Mich 164; 200 NW2d 227 (1972), this Court rejected the argument that a decision of the Court of Appeals could become the law of the case and thereby bind the Supreme Court if the losing party in the Court of Appeals opted to proceed on remand rather than to seek review in the Supreme Court. See also *Hack v Concrete Wall Co*, 350 Mich 118, 130; 85 NW2d 109 (1957).
>
> Thus, whether a losing party in the Court of Appeals does not appeal or this Court denies an application for leave to appeal, the judgment of the Court of Appeals does not preclude review by this Court at a subsequent stage of the proceedings.
>
> The United States Supreme Court has similarly held: (1) a denial of certiorari does not express any view concerning the merits of the lower court's judgment, *Hamilton-Brown Shoe Co v Wolf Brothers & Co*, 240 US 251, 258; 36 S Ct 269; 60 L Ed 629 (1916); *Maryland v Baltimore Radio Show, Inc*, 338 US 912, 917; 70 S Ct 252; 94 L Ed 562 (1950) (opinion of Frankfurter, J.); *Hathorn v Lovorn*, 457 US 255, 262, fn 11; 102 S Ct 2421; 72 L Ed 2d 824 (1982); (2) a denial of certiorari does not render the Court of Appeals decision the law of the case for purposes of subsequent Supreme Court review, *Mercer v Theriot*, 377 US 152, 153-154; 84 S Ct 1157; 12 L Ed 2d 206 (1964); *Hathorn v Lovorn, supra*; and (3) the failure of the losing party in the United States Court of Appeals to petition for certiorari does not [citations omitted]"

Moreover, the subject matter jurisdiction of any court to enter any order may be considered at any time, including after the end of available appeals. *Ward, supra*. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 97-98; - NW2d - (2005).

RELIEF

Wherefore, amicus curiae Workers' Compensation Section of the State Bar of Michigan prays that the Supreme Court vacate the opinion of the Court of Appeals in *Reed v Yackell (On Remand)*, unpublished opinion of the Court of Appeals, decided on June 8, 2004 (Docket no. 236588) and remand the case to the Workers' Compensation Agency for remission to the Board of Magistrates to convene a hearing and decide in a written order and opinion whether plaintiff, counter-defendant-appellee Ricky Reed was an *employee* of defendant, counter-plaintiff, cross-plaintiff-appellant Mr. Food, Incorporated, within the rubric of MCL 418.161(1)(l) and (n) which may be appealed to the Workers' Compensation Appellate Commission, the Court of Appeals and Supreme Court by the terms of MCL 418.859a(1) and MCL 418.861a(14) before deciding whether to affirm or vacate the judgment of the Circuit Court for the Third Judicial Circuit of the State of Michigan in *Reed v Yackell*, unpublished judgment of the Circuit Court for the Third Judicial Circuit of the State of Michigan, entered on June 15, 2001 (Docket no. 98-839576-NI).

Martin L. Critchell (P26310)
Counsel for amicus curiae
Workers' Compensation Section of the
State Bar of Michigan
660 Woodward Avenue, Suite 1010
Detroit, Michigan 48226
(313) 961-8690